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Supreme Court, U.S.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,

Petitioner,

—v.—

TONY TURPIN, WARDEN,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GEORGIA IN SUPPORT OF PETITIONER

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

15PP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in our Constitution. The ACLU of Georgia is one of its statewide affiliates, and has a particular interest in the resolution of this case because it arises in the state of Georgia.

Since the first Judiciary Act of 1789,[2] the writ of habeas corpus has been an essential part of the constitutional landscape and a critical means for the vindication of constitutional rights in federal court. Petitioner's inability to get his habeas petition even heard in the lower courts demonstrates the extent to which Congress has both curtailed the Great Writ and slammed the doors of the federal courthouse in the face of a disfavored class of litigants.

To the extent that Congress has also sought to achieve its goal of expediting executions by stripping this Court of its appellate jurisdiction, Congress has brought to the fore a series of profound constitutional questions that have been frequently discussed but never decided in 200 years, and that threaten to alter the fundamental nature of our constitutional government.

The issue of whether Congress may limit the appellate jurisdiction of this Court and, if so, whether that power is subject to any independent constitutional constraints is a matter of significant institutional importance to the ACLU, which regularly appears in cases before this Court involving a broad array of constitutional disputes. Today, the narrow

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Act of Sept. 24, 1789, ch.20, 1 Stat. 73, *codified at* 28 U.S.C. §2241.

question that must be addressed is whether Congress can make the federal courts of appeal the final arbiters of the appropriateness of successive habeas petitions filed by state prisoners. But that power, once recognized, will be difficult to cabin, and tomorrow we will inevitably be facing even bolder efforts by future legislative majorities to limit this Court's appellate jurisdiction over other constitutional claims.

This brief therefore focuses on the first question identified by the Court when it accepted this case for review. 64 U.S.L.W. 3740 (May 3, 1996). We wish to make clear, however, that our decision to focus on the complex jurisdictional relationship between Congress and this Court -- and, in particular, the meaning of the Exceptions Clause under Article III[3] -- is primarily a function of the expedited briefing schedule set by the Court. As discussed below, we believe the constitutional stakes can and should be substantially reduced by construing the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-518, to foreclose only one avenue of this Court's appellate jurisdiction over successive habeas petitions rather than all avenues. Further, we believe that a construction of the Act foreclosing *any* review by this Court of successive habeas petitions that fail to survive prescreening by the court of appeals cannot be reconciled with this Court's constitutionally assigned role under Article III as the final arbiter of what the Constitution means. Because of the expedited briefing schedule and the basis for the decision below, this brief does not address any issues arising under the Constitution's Suspension Clause.[4]

[3] "In all Cases affecting Ambassadors, other Public Ministers and consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., Art. III, §2, cl.2.

STATEMENT OF THE CASE

The Anti-Terrorism and Effective Death Penalty Act of 1996 was signed into law on April 24, 1996. This case concerns one section of that Act, which governs the circumstances under which federal courts can hear and decide "second or successive" habeas corpus petitions filed by state prisoners under 28 U.S.C. §2254.[5]

Even prior to passage of the Act, a state prisoner filing a successive petition in federal court faced substantial obstacles under this Court's decisions. *See, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991). Nevertheless, Congress remained concerned with what it perceived as "the problem of delay and repetitive litigation in capital cases." H.Rep.No. 104-23, 104th Cong. 1st Sess. 9 (1995). It addressed this "problem" in §106(b)(3) of the Act, which sets forth a unique set of substantive and procedural rules that apply only to successive habeas petitions. First, §106(b)(3)(A) provides that a successive habeas petition may not even be filed in the district court unless the petitioner obtains advance authorization from a panel of the court of appeals. Second, §106(b)(3)(C) provides that the court of appeals panel may not grant authorization unless it finds that the applicant has made out a *prima facie* case that the constitution-

[4] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. Const., Art. I, §9, cl.2.

[5] For simplicity's sake, this brief will refer to successive petitions rather than the redundant reference to "second or successive" petition used in the Act itself.

al claim asserted in the successive petition: (1) rests on a new rule of constitutional law "that was previously unavailable," or (2) on factual allegations that "could not have been discovered previously through the exercise of due diligence" and that, if proven, would establish a basis for petitioner's acquittal by clear and convincing evidence. Finally, and most relevant here, §106(b)(3)(E) provides that a state prisoner whose application to file a successive habeas petition has been denied by a three-judge panel of the court of appeals may not seek rehearing from the court of appeals itself nor seek review by this Court through a writ of *certiorari*.

Petitioner Ellis Wayne Felker, who is facing a sentence of death, attempted to file a second habeas petition on May 1, 1996, one week after the new Act went into effect. In compliance with the provisions of the new Act, he sought permission from the Eleventh Circuit prior to filing in the district court. His request for permission was denied by the court of appeals on May 2, 1996.[6] The question now presented for review is whether that gatekeeping function assigned to the court of appeals by the new Act is entirely unreviewable by this Court, initially as a matter of statutory construction and ultimately as a matter of constitutional law.

SUMMARY OF ARGUMENT

Amici respectfully submit that this is neither the case nor the time for the Court to resolve the meaning of the Exceptions Clause in Article III, a question of enormous constitutional moment that has been left undecided for 200 years. To be sure, the Court has discussed the meaning of the Exceptions Clause on various occasions over the past two centuries. But the most that can be said about the prior discussions is that they have framed the terms of the debate. The Court has wisely refrained from finally settling the question of congressional authority over the Court's appellate jurisdiction because Congress has wisely refrained from forcing the question by always leaving open at least some avenue for this Court to exercise appellate review of substantial constitutional claims.

In this case, Congress has undeniably closed off one avenue of review: *certiorari* jurisdiction is no longer available under 28 U.S.C. §1254 when a state prisoner's request to file a successive habeas petition under 28 U.S.C. §2254 is denied by a three-judge panel of the court of appeals. However, nothing in the language of the new Act even purports to limit this Court's jurisdiction over habeas actions under 28 U.S.C. §2241. This was precisely the situation in *Ex Parte McCardle*, 74 U.S. 506 (1869), and it was key to the Court's willingness to uphold a congressional statute depriving the Court of jurisdiction to hear appeals from the federal circuit courts. Given this widely circulated view of *McCardle* and the prominent role it has played in the constitutional debate over the Exceptions Clause, there is no reason to believe that the omission by Congress of any mention of §2241 in the new Act was inadvertent.

At the very least, the 1996 Act is susceptible to an interpretation that would leave this Court's jurisdiction under §2241 intact. Even if the Act could be described as ambiguous in this regard, traditional rules of statutory construction favor an interpretation of the Act that avoids difficult constitutional questions. *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979). This Court, moreover, has routinely insisted on a clear statement from Congress before it intrudes on the constitutional prerogatives of the states under the Eleventh Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). It is even more appropriate to insist upon a clear statement from Congress before it overrides

[6] *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996).

the constitutionally assigned role of a co-equal branch of the federal government, especially in circumstances where the power of Congress to act in this fashion is anything but clear.

There is yet another reason for the Court to hesitate before plunging into a full-scale exploration of the meaning of the Exceptions Clause in this case, at this time. Whatever else may be said about the relationship between Congress and the Court under Article III, it presents constitutional issues of daunting difficulty. The academic commentary in this area is extensive, it has been written by many of our nation's leading constitutional scholars, it is conflicting, and it is complex. If the Court feels compelled to go beyond the question of statutory construction and reach the underlying constitutional questions, *amici* respectfully submit that the Court should order reargument in the fall and give each side a chance to submit additional briefs.

Should the Court reach the Exceptions Clause issue in this case, *amici* urge the Court to reject a view of the Exceptions Clause that grants Congress plenary authority over the Court's appellate jurisdiction. Such an expansive view of the Exceptions Clause cannot be reconciled with the text of the Constitution, its history or its structure. Nor can it be reconciled with our deeply embedded view of the role of the Supreme Court in our constitutional scheme of checks and balances. *Marbury v. Madison*, 5 U.S. 137 (1803). If forced to choose, the Court should embrace the position first articulated by Professor Hart forty-five years ago in his famous dialogue on federal jurisdiction: any exceptions to the Supreme Court's appellate jurisdiction enacted by Congress "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., "The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1362, 1365 (1953).

The provisions of the 1996 Act at issue in this case cannot be sustained under this standard. The issue is not whether successive habeas petitions are a part of this Court's "essential role" in some abstract sense. Rather, the issue is whether the small core of successive habeas petitions still permitted under the 1996 Act implicate this Court's "essential role . . . in the constitutional plan." If this Court is deprived of jurisdiction to decide whether a state prisoner's constitutional claim is entitled to a second look because of new law or new facts, then the Court is effectively denied the jurisdiction it needs to assure the supremacy of federal law and a uniform interpretation of the federal Constitution. There is little doubt, however, that the Court's role in assuring a uniform and supreme interpretation of the federal Constitution was central to the compromise that produced Article III at the Constitutional Convention.

ARGUMENT

I. THIS CASE, AT THIS TIME, IS NOT AN APPROPRIATE VEHICLE FOR THE COURT TO DECIDE WHETHER AND TO WHAT EXTENT CONGRESS MAY LIMIT THE COURT'S APPELLATE JURISDICTION UNDER ARTICLE III

The decision, in Article III, to vest the judicial power of the newly formed union in "one supreme Court and in such inferior Courts as the congress may from time to time ordain and establish," was one of the great political compromises of the Constitutional Convention. Adopted after great debate, it assured the supremacy of federal law by guaranteeing that state courts would not have final say over the meaning of the federal Constitution. At the same time, it reassured the states that their traditional prerogatives would not be usurped by a constitutionally ordained system of lower federal courts with general jurisdiction. *See generally*

Lawrence Sager, "Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," 95 Harv.L.Rev. 17, 46-49 (1981). By contrast, the Exceptions Clause was adopted by the Convention "without a ripple of recorded debate, concern, or explication." *Id.* at 51 (footnote omitted).

The extent to which this almost casually adopted, last minute addition to Article III was meant to leave the role of the Supreme Court as the ultimate arbiter of the Constitution at the whim of the national legislature has been hotly debated by constitutional scholars for many years. Yet despite this debate, and despite opportunities to do so, this Court has never definitively resolved the meaning and scope of the Exceptions Clause. Whether that hesitancy reflects the Court's general reluctance to decide constitutional questions unless absolutely necessary, *see Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936)(Brandeis, J., concurring), or a more specific view that the very ambiguity of the Exceptions Clause creates a healthy tension between the legislative and judicial branches that itself promotes the constitutional goal of checks and balances, the history of this endeavor reinforces the appropriateness of caution.

Here, there are at least two powerful reasons to proceed slowly. First, §106(b)(3)(E) of the 1996 Act does not, in fact, foreclose all Supreme Court review of the successive habeas petition in this case. Second, the Article III questions lurking in the background of this case are both exceedingly complex and exceedingly consequential. As this Court has recognized for 200 years, there are very good reasons to avoid prematurely opening this constitutional Pandora's box.

A. The 1996 Act Does Not Foreclose Supreme Court Review Under 28 U.S.C. §2241

This issue of statutory construction has been fully addressed in petitioner's brief. Rather than repeat that discussion, we will limit ourselves to a few salient points.

As this Court has frequently emphasized, the interpretation of any statute must begin with the language of the statute itself. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances"). In this case, nothing in the language of the 1996 Act even purports to limit this Court's habeas jurisdiction under 28 U.S.C. §2241.[7] Indeed, 28 U.S.C. §2241 is not even mentioned in §106 of the 1996 Act. This omission is particularly telling in light of the statute's explicit reference to "successive habeas corpus application[s] under section 2254." §106(b)(1)(2). Under familiar rules of statutory construction, the purposeful inclusion of a reference to §2254 in the provision limiting this Court's appellate jurisdiction implies the equally purposeful exclusion of any reference to §2241 in the same provision. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993).

Any effort to read §2241 into the embrace of the 1996 Act and its limit on this Court's appellate jurisdiction also runs afoul of the principle that repeals by implication are disfavored. *E.g., Morton v. Manari*, 417 U.S. 535, 549 (1974). This principle is as applicable in the jurisdictional context as in any other. Perhaps even more so. On the one hand, it has long been held that the affirmative decision by Congress to confer jurisdiction on the federal courts, including this Court, implies the "negation" of any jurisdiction not affirmatively granted. *Ex Parte McCardle*, 74 U.S. at 513, citing *Durousseau v. United States*, 10 U.S. 307 (1818). On

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[7] 28 U.S.C. §2241(a) provides, in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

the other hand, the repeal or limitation of a specific jurisdictional grant does not implicitly repeal or limit other jurisdictional statutes that are not mentioned.

Most notably, this was exactly the situation that confronted the Court in *Ex Parte McCardle*, 74 U.S. 506. McCardle was arrested by the U.S. Army and charged with violating the Military Reconstruction Act of 1867 for publishing inflammatory editorials as editor of the Vicksburg Times . Contending that the Act was unconstitutional, McCardle filed a habeas petition in federal court. When the writ was denied, he appealed to the Supreme Court. While his appeal was pending, Congress repealed the statute that granted this Court jurisdiction over appeals in habeas cases. Although this Court upheld the repeal under the Exceptions Clause, a matter that will be dealt with at greater length later, it carefully concluded its opinion with the following, much-quoted observation:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the Court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

74 U.S. at 515.[8]

One year later in *Ex Parte Yerger*, 75 U.S. 86 (1869), the Court explicitly relied on the "previous" habeas jurisdiction it had alluded to in *McCardle*. "We could come to no other conclusion," Chief Justice Chase wrote, "without holding that the whole appellate jurisdiction of this Court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication . . . ." 75 U.S. at 106.

By holding here, as it did in *McCardle* and *Yerger*, that §2241 is unaffected by the limitations that Congress imposed on §2254 appeals in the 1996 Act, the Court will be acting in accord with yet another rule of statutory construction. Out of deference to Congress, this Court has consistently held that federal statutes should be construed to avoid constitutional difficulties, whenever possible. *E.g.*, *NLRB v. Catholic Bishop*, 440 U.S. at 507; *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Whatever the final resolution of the question may be, it is undeniable that construing the 1996 Act to withdraw this Court's appellate jurisdiction in its entirety whenever a successive habeas petition is not precleared by the circuit courts would raise profound constitutional questions. These constitutional difficulties can be avoided if the 1996 Act is plausibly construed to leave intact this Court's longstanding habeas jurisdiction under §2241.

Lastly, deference between co-equal branches of the federal government is and must be a two-way street. This Court has repeatedly required a clear statement from Congress before it would abrogate a state's Eleventh Amendment immunity. *E.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242-43. It is no less appropriate to require a clear statement from Congress before concluding that the legislature intended to abrogate the Court's historic role as a final arbiter of constitutional claims in habeas cases. Needless to say, Congress in this case has made no statement at

[8] The Court's reference in *McCardle* to "jurisdiction which was previously exercised" refers to the predecessor to 28 U.S.C. §2241. Thus, *McCardle* is precisely analogous to the situation here.

all regarding §2241, let alone one with the requisite clarity even to contemplate disturbing the delicate constitutional balance that has prevailed for 200 years.

B. If Reached, The Fundamental Constitutional Issues Presented By This Case Deserve Careful And Deliberate Review

In the prescient words of Professor Gunther, "the complexity of these problems is directly proportional to the length of time one dwells on them." Gerald Gunther, "Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate," 36 Stan.L.Rev. 895, 898 (1984). This Court, of course, is not bound by the academic debate that has swirled around the Exceptions Clause for several decades. Nevertheless, the absence of any consensus within the academic community on such a fundamental question of constitutional jurisprudence certainly suggests the need for careful deliberation.

The academic commentary, which is voluminous, can be divided into several camps. The view that commands perhaps the broadest consensus is most prominently associated with Professor Hart. Hart's view, since adopted (with various nuances) by many others, holds that the Exceptions Clause does not permit Congress to intrude upon the essential functions of the Supreme Court in the constitutional plan. *See, e.g.*, Hart, *supra*; Sager, *supra*; Leonard G. Ratner, "Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction," 27 Vill.L. Rev. 929 (1982); Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," 109 U.Pa.L. Rev. 157 (1960)(hereinafter "Congressional Power").

The proposition that congressional power under the Exceptions Clause is subject to some constitutional limits is broadly accepted within the academic literature. However, a second group of commentators takes the position that those limits must be located in the Bill of Rights rather than in Article III itself. *See, e.g.*, Gunther, *supra* (and articles cited therein).

Those two principal positions are then supplemented by several others. For example, a third view holds that the Exceptions Clause only authorizes Congress to limit the manner in which the Court may review questions of fact, but does not limit the Court's appellate jurisdiction to review questions of law. *See* Henry J. Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Bases," 47 Minn.L.Rev. 53 (1962). Still a fourth view holds that the Exceptions Clause grants Congress no power to limit the Supreme Court's appellate jurisdiction in federal question cases but plenary authority to limit the Court's appellate jurisdiction in certain other "controversies." *See* Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," 65 B.U.L.Rev. 205 (1985).

The purpose of this summary and incomplete review is not to take sides although, as previously noted, *amici* believe that the "essential function" view expressed by Professor Hart and others comes closest to the true meaning of the Exceptions Clause. It is simply to illuminate the breadth of the literature and the depth of the problem. Should this Court find it necessary to reach those "substantial questions" on the facts of this case, we respectfully suggest that the cases be recalendared for the fall and that the parties and *amici* be given an additional opportunity to brief the constitutional questions identified by this Court in its order of May 3, 1996.

II. THIS COURT SHOULD REJECT ANY INTERPRETATION OF THE EXCEPTIONS CLAUSE THAT PERMITS CONGRESS, IN ITS SOLE DISCRETION, TO LIMIT THIS COURT'S APPELLATE JURISDICTION TO HEAR CONSTITUTIONAL CLAIMS

If the Court reaches the merits of the Article III controversy, the constitutional stakes rise enormously. The question of whether, and to what extent, Congress can limit this Court's appellate jurisdiction by invoking the Exceptions Clause has implications that extend far beyond the narrow context of successive habeas petitions. In the early 1980s, literally scores of bills were introduced in Congress to strip this Court (and often the lower federal courts, as well) of jurisdiction to hear cases involving school prayer, school busing, and abortion. *See* Sager, *supra*, at 18 n.3. Fifteen years ago Congress wisely stepped back from the precipice by defeating each of these assaults on the Court's jurisdiction. But given the current political climate, there is every reason to believe that these or similar bills would be resurrected were this Court to adopt a view of the Exceptions Clause that left Congress free to impose whatever limitations it chose on this Court's appellate jurisdiction.

What may be conceivable in theory would be devastating in practice to the real world system of checks and balances that has enabled our constitutional system to function for 200 years. In the end, therefore, few scholars quarrel with the notion that the Exceptions Clause must be subject to some constitutional constraints. The existence of a national union presupposes the supremacy of federal law; the supremacy of federal law presupposes the existence of an institution capable of defining and enforcing federal law; since *Marbury v. Madison*, 5 U.S. at 177, "[i]t is emphatically the province and duty of the judicial department to say what the law is"; and that duty cannot be performed with consistency and courage if Congress is free to strip the Court of its appellate jurisdiction whenever Congress sees fit.

The argument that Congress has plenary power under the Exceptions Clause is thus at odds with the most fundamental premises of our constitutional government. Not surprisingly, it is also inconsistent with the language, history, and structure of the Constitution itself.

A. The Language, History, And Structure Of Article III Do Not Support An Expansive Reading Of The Exceptions Clause

On its face, Article III plainly does not grant Congress power to withdraw this Court's appellate jurisdiction in its entirety. It merely grants Congress power to make "exceptions" to the appellate jurisdiction conferred on this Court by Article III itself. As commonly understood, the term "exceptions" assumes the existence of a larger whole from which the exceptions are drawn.[9] Because there is no reason to believe that the framers used the term "exceptions" in anything other than its ordinary sense, the most logical reading of the Exceptions Clause is that it permits Congress to withdraw some, but not all, of the Court's appellate jurisdiction. *See* Hart, *supra*, at 1364. Of course, this still leaves open the question of what jurisdiction can be withdrawn under the Exceptions Clause and what cannot. But the recognition that there are some limits to what Congress can do under the Exceptions Clause is sufficient to defeat the claim that the Exceptions Clause confers plenary authority on Congress to do whatever it deems fit.

This interpretation of the term "exceptions" as "im-

[9] *See* Ratner, "Congressional Power," *supra*, at 168 (surveying contemporary dictionary definitions of the word "exception").

pl[ying] some residuum of jurisdiction" that Congress cannot take away, Hart, *supra*, at 1364, is also consistent with the legislative history of the Exceptions Clause as reflected in the records of the Constitutional Convention. *See generally* Ratner, "Congressional Power," *supra*, at 172-73. The initial version of the Exceptions Clause first appeared in a draft prepared by the Committee on Detail.[10] After defining the original jurisdiction of the Supreme Court, the draft stated: "In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make." 2 Farrand, RECORDS OF THE CONSTITUTIONAL CONVENTION 186 (1911). During the debate that followed in the Convention, this version was amended by adding the phrase "both as to law and to fact" after the word "appellate." *Id.* at 424, 431. At that point, the Exceptions Clause was essentially in its present form. A motion was then made to substitute an entirely different version of the Exceptions Clause, which read: "In all other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." *Id.* at 425, 431. This substitute was defeated by a vote of six delegations to two. *Id.* Had it been adopted, the argument in favor of plenary congressional control over the Court's appellate jurisdiction would have been much stronger. Its defeat sends precisely the opposite message. *See* Ratner, "Congressional Power," *supra*, at 173.

The argument in favor of plenary congressional authority is also inconsistent with the basic political compromise that produced Article III and gave it shape. The notion that the Constitution should provide for a Supreme Court was relatively uncontroversial at the Convention. *See* Sager, *supra*, at 33. The debate over the creation of the lower federal courts, by contrast, was quite rancorous. *Id.* at 34. Ultimately, Madison persuaded the Convention that the solution to the dilemma was to authorize Congress to create inferior federal courts as it deemed necessary. *Id.* at 47. Thus, both the existence and jurisdiction of the lower federal courts was committed to legislative discretion. To interpret the Exceptions Clause as committing the jurisdiction of the Supreme Court to legislative discretion, as well, would have created a parity in constitutional status between the Supreme Court and the lower federal courts that the framers clearly did not contemplate or intend.

B. The "Essential Functions" Test Effectively Reconciles The Structure Of Article III And The Meaning Of The Exceptions Clause

If the Exceptions Clause does not grant Congress plenary authority to control the Supreme Court's appellate jurisdiction, the task becomes to define what it may and may not do. In our view, the boundary proposed by Professor Hart forty-five years ago is an appropriate starting point. At a minimum, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *supra*, at 1365. The Reagan Administration took the same view in 1982 when asked to comment on a legislative proposal by Senator Helms to withdraw the Court's appellate jurisdiction in cases involving "voluntary" prayer. In a letter to Senator Thurmond, as Chairman of the Senate Judiciary Committee, Attorney General William French Smith argued that Congress could not constitutionally "'make exceptions' to Supreme Court jurisdiction which would intrude upon the core function of the Supreme Court as an independent and equal branch in our system of separation of powers." Echoing Professor Hart, the Attorney General concluded: "Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it impairs

[10] The Committee on Detail kept no record of its own proceedings.

the Court's core functions in the constitutional scheme."[11]

There is, of course, a certain indeterminacy in the references to "essential" or "core" functions. But like other great constitutional concepts, its meaning must be derived from history and context. The consensus that developed at the Convention to create a Supreme Court was primarily tied to two related notions: the need to assure the supremacy of federal law and the need to assure a uniform interpretation of federal law. Both notions were captured by Madison in THE FEDERALIST PAPERS, No.80. With regard to supremacy, he wrote:

> What, for instance, would avail restrictions on the authority of the State legislature, without some constitutional mode of enforcing the observance of them? . . . This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union . . . . The latter appears to have been thought by the convention preferable to the latter . . . .

With regard to uniformity, Madison observed, "Thirteen independent courts of final jurisdiction over the same causes, arising out of the same laws, is a hydra in government, from which nothing but contradiction and confusions can proceed." THE FEDERALIST PAPERS, No.80, at 500 (B. Wright ed. 1961).[12]

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[11] These excerpts from the Smith letter appear in Gunther, *supra*, at 902-03.

[12] The fact that the 1996 Act contemplates prescreening by the federal circuits does not safeguard the interest in either supremacy or uniformity when authorization to file a successive habeas petition is denied, as it was in this case.

Few scholars, if any, disagree with the proposition that maintaining the supremacy and uniformity of federal constitutional law is an essential function, indeed *the* essential function, of the Supreme Court. Instead, those scholars who take issue with Hart's interpretation of the Exceptions Clause argue that Hart's view, whatever its persuasiveness, is foreclosed by this Court's decision in *Ex Parte McCardle*, 74 U.S. 506. As described above, however, *McCardle* simply did not involve a total withdrawal of this Court's appellate jurisdiction in habeas cases, a point made emphatically clear by this Court's concluding remarks, *id.* at 515, and then reinforced by its decision the following year in *Ex Parte Yerger*, 75 U.S. 85. Fairly read, therefore, *McCardle* points the way around a constitutional clash over the meaning of the Exceptions Clause. If that prudential detour is rejected, nothing in *McCardle* gives the answer to how the Exceptions Clause should now be construed.

C. The 1996 Act Intrudes Upon The Essential Functions Of The Court

The 1996 Act contains both substantive and procedural limits on successive habeas corpus petitions. By sharply curtailing the circumstances under which a successive habeas petition can be granted, however, the Act paradoxically underscores the necessity and propriety of Supreme Court review. Put into colloquial terms, the Act provides that a successive petition can only be granted when the prisoner's constitutional claim rests on new law or new facts that convincingly undermine the constitutional legitimacy of a state conviction. To allow a conviction to stand under these circumstances without even the possibility of Supreme Court review would threaten both the supremacy and uniformity interests that Article III is designed to promote.

In a system based upon the supremacy of the federal Constitution, that result demeans both law and justice. If

nothing else, the "essential" functions of this Court surely encompass the responsibility to correct a state court's disregard of federal constitutional principle when a person's life is at stake.

CONCLUSION

For the reasons stated herein, this Court should rule that the Anti-Terrorism and Effective Death Penalty Act of 1996 does not foreclose all appellate review of the habeas petition in this case and that, insofar as it does, §106(b)(3)(E) of the Act is unconstitutional.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: May 17, 1996